1095-2009-2768 0

STATE OF WISCONSIN CIRCUIT COURT BRANCH 01 MILWAUKEE COUNTY

MICHAEL PENDERGAST,

Plaintiff,

Case No.: 09 CV 16819

vs.

BOARD OF FIRE AND POLICE COMMISSIONERS for the CITY OF MILWAUKEE,

Defendant.

FINAL DECISION AND ORDER

INTRODUCTION

Plaintiff Michael Pendergast (Plaintiff or Pendergast) appeals the October 6, 2009 decision of the Board of Fire and Police Commission (Board) in which the Board overturned the Hearing Examiner's ruling and re-imposed the additional thirteen days of punishment for violating the Standard Operating Procedure entitled "Mandatory Court Appearances." For the reasons stated below, this Court affirms the decision of the Board.

THIS CAUSE coming before the Court on the Review of Order of the Board of Fire and Police Commission, a timely Summons and Complaint having been filed, and the parties having presented their respective positions through written briefs, the Court entered a Decision and Final Order on May 6, 2010.

BACKGROUND

Plaintiff is employed as a Milwaukee Police Officer. In April and May of 2006, over the course of nineteen days, Plaintiff failed to appear in court as required by a subpoena that was served upon him on seven instances. As a result, in June 2006, the Milwaukee Police

Department (MPD) initiated an internal investigation of Plaintiff. The MPD completed its investigation in July 2006. On June 29, 2006, Plaintiff was interviewed regarding his missed court appearances. Plaintiff admitted that he failed to appear at the seven court appearances due to personal reasons that he did not wish to disclose at that time. The investigation into Plaintiff's failure to obey the seven subpoenas concluded on July 26, 2006. A request was made to the Milwaukee Police Department not to proceed further with discipline of the Plaintiff. On April 15, 2007 Plaintiff submitted an "In the matter of" report to Chief Hegerty describing in detail the effect that an October 31, 2003 on-duty critical incident in which Plaintiff was forced to take the life of an individual had on Plaintiff's life and his performance as a police officer. Specifically, Plaintiff described the nightmares, sleep loss, physical illness and depression that he suffered from due to the fatal on-duty incident. The Board found that Plaintiff's mental health issues affected his work and was a substantial factor in causing him to fail to appear at the seven court appearances between April 26, 2006 and May 15, 2006. The Board further found that subsequent to his missed court appearances, Plaintiff has sought psychological counseling and treatment.

On May 9, 2007, Plaintiff was served with personnel orders for each of his seven missed court appearances. The orders imposed progressive punishment for the number of appearances missed. Plaintiff appealed to the Board the sixth and seventh violations that imposed six and seven day suspensions pursuant to Wis. Stat. sec. 62.50(13).

Prior to the hearing, the parties made a number of stipulations, including that the first five just cause standards under Wis. Stat. sec. 62.50(17)(b) were met. The Hearing Examiner concluded that the discipline applied by the Chief of Police was fair and non-discriminatory to Plaintiff and that the discipline is not reasonable as it relates to the seriousness of the violations

and the officers' service record with the Milwaukee Police Department. The Hearing Examiner further concluded that although the two violations must be viewed independently, they are part of a collective demonstration of Plaintiff's reaction to the critical incident occurring years earlier and that to the Plaintiff's credit, he has subsequently received appropriate intervention by professionals; to his detriment, he did not receive sufficient care prior to these incidents. The Hearing Examiner determined that the 15 day cumulative discipline suspension without pay was a reasonable penalty for the totality of the events.

On October 6, 2009, after reviewing the record, the Board issued its decision. The Board adopted the Findings of Fact and Conclusions of Law numbered one through six of the Hearing Examiner's recommendation. As to Conclusions of Law numbered seven, the Board found that the proposed discipline reasonably relates to the seriousness of the alleged violation and to Police Officer Pendergast's record of service with the Milwaukee Police Department. The Board upheld the 13 day suspension imposed by the Chief as to the two violations. The Board recommended that Plaintiff continue to seek the necessary professional assistance to maintain the high level of dedication and delivery of services expected of Milwaukee Police Department officers.

STANDARD OF REVIEW

Under statutory review, in accordance with Wisconsin Statute §62.50(21), the Court will determine: "under the evidence is there just cause, as described in sub. 17(b), to sustain the charges against the accused?"

Wisconsin Statute §62.50 states:

(17) Decision, Standard to Apply …

(b) No police officer may be suspended, reduced in rank, suspended and reduced in rank, or discharged by the board under sub. (11), (13) or (19), or under par. (a),

based on charges filed by the board, members of the board, an aggrieved person or the chief under sub. (11), (13) or (19), or under par. (a), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3. was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

A circuit court determines whether there is just cause, based on the evidence, to support an order of the board of fire and police commissioners. *Gentilli v. Board of Fire & Police Comm'rs of the City of Madison*, 2004 WI 60, ¶ 35, 272 Wis.2d 1, 680 N.W.2d 335.

The Board's decision must be reasonable, based on the evidence that the Board found to be credible. *Younglove v. City of Oak Creek Fire & Police Commission*, 218 Wis.2d 133, 139, 579 N.W.2d 294 (Ct. App. 1998). The circuit court is not permitted to take evidence. The test is whether taking into account all the evidence in the record, "reasonable minds could arrive at the same conclusion as the agency." *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5, 252 Wis.2d 561, 569, 644 N.W.2d 649. When "the evidence allows more than a single reasonable inference, a question of fact is presented, and the Commission's findings, if supported by any credible evidence, are conclusive upon the court." *Universal Foundry Co. v. DILHR*, 86 Wis. 2d 582, 589, 273 N.W.2d 324 (1979).

The Board's factual findings must be upheld if they are supported by credible and substantial evidence in the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). "Reviewing tribunals defer to credibility determinations made by those who hear and see the witnesses." 218 Wis.2d at 139.

ANALYSIS

Plaintiff alleges that the Board's decision must be reversed for the following reasons: (1) the Chief failed to apply the rule fairly and without discrimination in violation of Wis. Stat. sec. 62.50(17)(b)(6), and (2) the Board's penalty does not reasonably relate to either the seriousness of the offense or to Plaintiff's record of service with the MPD, in violation of Wis. Stat. sec. 62.50(17)(b)(7).

I. Whether the Chief is applying the rule or order fairly and without discrimination against the subordinate in accordance with Wis. Stat. sec. 62.50(17)(b)(6).

Plaintiff alleges that the discipline was out of line with comparable discipline previously imposed, the Chief failed to follow the concept of progressive discipline and that the Chief discriminated against Plaintiff by considering the nature of the underlying court cases he missed, in direct opposition to its own policy.

On review, the Court is limited to finding whether there was just cause, based on sufficient evidence, to uphold the Board's finding. As set out below, the Court is convinced that the record contains ample evidence to support the Board's finding that the Chief of Police established by a preponderance of the evidence a finding of just cause to sustain the decision.

The Milwaukee Police Department uses a progressive discipline system when an officer fails to appear in court pursuant to a subpoena. Under the progressive discipline system, after the first violation, which warrants an official reprimand, protocol requires that the period of

suspension progresses with the number of violations. Applying progressive discipline to Plaintiff's seven 2006 violations resulted in one day for the first violation (Plaintiff had a violation in 2005 in which he received a reprimand), and for his second 2006 violation, a two day suspension; for his third 2006 violation, a three day suspension; for his fourth 2006 violation, a four day suspension; for his fifth 2006 violation, a five day suspension; for his sixth 2006 violation, a six day suspension; for his seventh 2006 violation, a seven day suspension; and for his eighth 2006, an eight day suspension.

In support of his argument that the discipline was out of line with comparable discipline previously imposed, Plaintiff relies on a comparables chart in which alleged comparable charges and the corresponding discipline imposed is outlined. However, the chart does not specify how many times the officers previously failed to appear in court. There is no way of knowing, by looking at the comparables chart, whether the "comparable" violations were the officer's first violation or fifth violation. Therefore, the Court finds the comparables chart to be unpersuasive of Plaintiff's argument that he was disciplined unfairly in comparison to other officers for violating the same rule.

The Chief had the option to terminate the Plaintiff upon his sixth violation; however, after considering Plaintiff's service record, the number of infractions, and the period of time in which they occurred, she chose to impose progressive discipline rather than terminate the Plaintiff. (R. 38 at 49-51). There is no persuasive support for Plaintiff's argument that his seven violations should have been considered as a "block" of conduct instead of seven separate violations.

The discipline imposed upon Plaintiff is in accordance with the progressive discipline system of the Milwaukee Police Department. Had the Chief not imposed the progressive discipline to Plaintiff's repeated violations of Rule 4, section 2/010.00, the Chief would not have been

applying the rule fairly and without discrimination and thus would have violated Wis. Stat. sec. 62.50(17)(b)(6). The Court is persuaded that the Chief properly imposed progressive discipline upon Plaintiff for his repeated violations of Rule 4, section 2/010.00 and thus the Chief acted in compliance with Wis. Stat. sec. 62.50(17)(b)(6).

Plaintiff further alleges that the Chief discriminated against Plaintiff by considering the nature of the underlying court cases he missed. The circuit court must determine, whether taking into account all the evidence in the record, "reasonable minds could arrive at the same conclusion as the agency." *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5, 252 Wis.2d 561, 569, 644 N.W.2d 649. When "the evidence allows more than a single reasonable inference, a question of fact is presented, and the Commission's findings, if supported by any credible evidence, are conclusive upon the court." *Universal Foundry Co. v. DILHR*, 86 Wis. 2d 582, 589, 273 N.W.2d 324 (1979). Regardless of whether the Chief took into account the seriousness of the court cases that Plaintiff missed, the Court is convinced that the progressive discipline system was properly applied to the Plaintiff and that the Chief properly took into account the number of violations and the Plaintiff's record of service. Here, the evidence allows more than a single inference, and thus this Court's review is limited to determining whether the Board's findings are supported by credible evidence. This Court concludes that the Board's finding—that the progressive discipline imposed by the Chief was proper, was in fact supported by credible evidence and is thus conclusive upon the Court.

II. **Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department in accordance with Wis. Stat. sec. 62.50(17)(b)(7).**

Plaintiff alleges that there is no reasonable relationship between the seriousness of the offense and the penalty imposed and that the penalty imposed does not reasonably relate to Plaintiff's record of service.

Under Wis. Stat. sec. 62.50(17)(b)(7), the proposed discipline shall reasonably relate to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

As noted above, the Hearing Examiner concluded that the discipline was not reasonably related to the seriousness of the violations and the Plaintiff's service record with the Department. The Board rejected this finding and determined that the discipline reasonably related to the seriousness of the violation and to Plaintiff's record of service.

The Board's decision states, "we find that the proposed discipline reasonably relates to the seriousness of the alleged violation and to Police Officer Pendergast's record of service with the Milwaukee Police Department." (R. 46). Deputy Inspector Hoerig testified that Plaintiff's service record was considered when making the decision on the appropriate punishment to impose. (R. 38 at 53). This is in accordance with the requirement of Wis. Stat. sec. 62.50(17)(b)(7). Plaintiff's behavior prior to the rule violations was considered, but his behavior after the rule violations was not taken into account. *Id.* The Court is not persuaded by Plaintiff's argument that a more reasonable interpretation of the "record of service" provision in Wis. Stat. sec. 62.50(17)(b)(7) would be the subordinate's *entire* record of service with the department. There is no legal support offered in support of this argument.

The Board's decision that the discipline is reasonably related to the seriousness of the offense is supported by credible and substantial evidence in the record. The record reflects that the Chief considered the seriousness of the offense and determined that Plaintiff's conduct was

"incorrigible." (R. at 51). The fact that this rule is violated often by Milwaukee Police Officers does not diminish the seriousness of Plaintiff's conduct and the fact that he violated the rule on seven occasions. Furthermore, Deputy Hoerig testified that Plaintiff's infractions are not in accordance with the mission of the police department, "which is to . . . control crime and disorder" and that "it is a very significant and serious offense to miss these types of case. And these are not traffic violations. These are misdemeanor cases, many involving drug arrests. I think that the Department has taken a very hard line on these people not appearing in court. Judges and defense attorneys and DAs have asked us to take a hard line, and that's exactly what I think Chief Hegerty did in this case." *Id.* In upholding the Chief's imposition of discipline, the Board considered the "seriousness of the offenses for which he was subpoenaed, the inconvenience and cost to the City, and the fact that he took no action to mitigate his absences." (R 46).

There is no evidence that the Board improperly considered the inconvenience and cost to the City when considering the seriousness of the offenses for which Plaintiff was subpoenaed. The Court must give deference to the Board's findings and this Court concludes that reasonable minds could arrive at the same conclusion as the Board.

CONCLUSION AND ORDER

Based on the record and briefs submitted by both parties, this Court finds that the record contains ample evidence to support the Board's findings under both statutory appeal.

Accordingly, **IT IS HEREBY ORDERED** that the decision of the Board of Fire and Police Commissioners of the City of Milwaukee is **AFFIRMED.**

This is a final order that disposes of the entire matter in litigation and is intended by the Court to be an appealable order under Wis. Stat. § 808.03(1). *See Tyler v. The Riverbank*, 2007 WI 33, ¶ 25, 299 Wis.2d 751, 762-63, 728 N.W.2d 686.

Dated this 6th day of May 2010, in Milwaukee, Wisconsin.

BY THE COURT:

Judge Maxine Aldridge White
Milwaukee County Circuit Court, Branch 1